UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

RENEE S. MAJORS,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CASE NO. 1:10-cv-1731-LJM-MJD
	)	
GENERAL ELECTRIC COMPANY,	)	
	)	
Defendant.	)	

PLAINTIFF'S BRIEF IN RESPONSE TO
DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

I. Introduction

Plaintiff, Renee Majors ("Majors"), a former employee of Defendant, General Electric Company ("GE"), makes federal claims of disability and sex discrimination and retaliation under the Americans with Disabilities Act, as amended ("ADA") and the Civil Rights Act of 1964, as amended ("Title VII"). Defendant's Motion for Summary Judgment as to Plaintiff's claims should be denied for the reasons set forth in detail herein.

There are genuine issues of material fact, including those related to:

- whether Majors was disabled under the provisions of the ADA;
- whether Majors was substantially limited in the major life activity of lifting;
- whether Majors' medical restrictions were current;
- whether GE's actions regarding failure to promote were motivated by the unlawful reason of Majors' disability;
- whether GE's actions regarding the assignment of overtime and Fridays were motivated by the unlawful reason of retaliation.

These factual issues preclude summary judgment.

II. Undisputed Material Facts That Preclude Summary Judgment

A. The Job Descriptions

Julia Karr was responsible for reviewing the job descriptions. (Ex D: Jones Dep., p. 7, 25) Jones was not aware of any routine schedule for the review of job descriptions. (Ex D: Jones Dep., p. 23) The PMA (Purchased Materials Auditor) and QCI (Quality Control Inspector) job descriptions, at the relevant time, had been last reviewed sixteen years prior, in 1993. (Ex. I: GE Response to Request for Documents – GE000674 and GE000676) Both jobs had physical requirements that included "intermittent movement of heavy objects," without quantification of "heavy." (Ex. I: GE Response to Request for Documents – GE000674 and GE000676) The QCI job description included the physical requirement of "intermittent work above shoulder level," while the PMA job description did not. (Ex. I: GE Response to Request for Documents – GE000674 and GE000676)

B. Majors' Job Performance Met Expectations

Majors was qualified for her job as a QCI at GE; her performance was rated as satisfactory and she was eligible for re-employment. (Ex. H: Myers Dep., p. 16)

C. The QCIs

There were four to five QCIs in the plant. (Ex C: East Dep., p. 9) QCIs brought defective parts to the PMA's location; stock handlers did not move the defective parts and neither did the PMAs retrieve them from the QCIs. (Ex C: East Dep., p. 11)

D. Majors Had Previously Held a PMA Position

Majors had previously worked as a PMA from December 2000 to June 2001. (Ex A:

Majors Dep., p. 20)

E. *Majors' Injury and Subsequent Restrictions*

Majors was injured on the job on September 20, 2000, when she fell and dislocated her right shoulder. (Ex. I: GE Response to Request for Documents – GE000248) On December 5, 2000, GE's physician classified her as temporarily restricted from lifting more than 20 pounds and from working above eye level with her right arm. (Ex. I: GE Response to Request for Documents – GE000551; Ex F: Kristoff Dep., p. 58) On August 9, 2001, GE's physician classified Majors as permanently restricted from lifting more than 20 pounds and from working above eye level with her right arm. (Ex. I: GE Response to Request for Documents – GE000309; Ex F: Kristoff Dep., p. 76) A Medical Classification form dated March 9, 2001 with identical restrictions, but not signed by a physician, was also completed. (Ex. I: GE Response to Request for Documents – GE000310; Ex F: Kristoff Dep., p. 76-77) On September 24, 2002, Majors was classified as permanently restricted from lifting more than 20 pounds and from working above eye level with her right arm. (Ex. I: GE Response to Request for Documents – GE000487; Ex F: Kristoff Dep., p. 59)

F. *The Permanency of Majors' Restrictions*

Only Toni Kristoff, or other Concentra staff, had access to the medical records, all of which were securely stored on-site at the plant. (Ex D: Jones Dep., p. 37) There was no regular cycle established to review the currency of permanent medical restrictions. (Ex F: Kristoff Dep., p. 76) Majors' Medical Classification form dated August 9, 2001 had the notation "prn" (as needed") in the "RE-EXAM" space. (Ex. I: GE Response to Request for Documents – GE000309; Ex F: Kristoff Dep., p. 76) Majors' Medical Classification form dated September 24, 2002 had the notation "D/C" in the "RE-EXAM" space. (Ex. I: GE Response to Request for

Documents – GE000487; Ex F: Kristoff Dep., p. 59) When Kristoff filed the Medical Classification forms, she arranged them in reverse chronological order. (Ex F: Kristoff Dep., p. 24)

The medical restrictions review process is not documented anywhere. (Ex F: Kristoff Dep., p. 40) Kristoff agreed that there was no difference in the lifting requirements for the QCI and the PMA positions. (Ex F: Kristoff Dep., p. 25-26) Kristoff acknowledged that Majors' medical restrictions had been an issue in 2005 after an ankle injury when she applied for a C82 position. (Ex F: Kristoff Dep., p. 35, 68)

G. *GE's Accommodation Review*

GE accommodated Majors after her ankle injury when she applied for a fabrication position that involved pulling oneself up and into the seat of a large fork lift. (Ex G: Lewellen Dep., p. 16-17) GE previously accommodated Majors when she applied for the QCI position; she was permitted to use a platform to address her range of reach and her ability to reach over the top of the refrigerators to verify the torque applied to screws. (Ex G: Lewellen Dep., p. 14)

GE agrees with and quotes Majors when she states "for years and years and years, it's like anytime anybody had a restriction, … the Clinic and the Ergonomics made accommodations for those people, so – if there was any way possible, they could get those jobs." (Ex A: Majors Dep., p. 182)

H. *Majors'Retirement*

Majors applied for the second PMA position after she elected to retire. (Ex E: Karr Dep., p. 7)

I. *Majors'Access to Overtime and Fridays Compared to Other QCIs*

GE's complement of QCI's included: Majors, Abrams, and Taylor, each one a job classification 9014; and Breedlove, May, Lewis, and Ira, each one a job classification 9018. (Ex. J: Supplemental Information Regarding QCI's, March 5, 2012) Abrams replaced Majors. (Ex. H: Myers Dep., p. 8) Taylor was on a leave of absence prior to April 5, 2009. (Ex. J: Supplemental Information Regarding QCI's, March 2, 2012) Breedlove became a lab technician on March 1, 2009. (Ex. J: Supplemental Information Regarding QCI's, March 5, 2012) The 9018 QCI records were produced by GE "to give … an idea of the hours generally worked by QCI's." (Ex. J: Supplemental Information Regarding QCI's, March 2, 2012)

1. Overtime [1]

GE's time records for QCI's for calendar year 2009 show the following regarding overtime: Majors worked 92.9 hours in 2008 and 26.6 hours in 2009, prior to her retirement; Abrams worked 208.1 hours in 2010; Taylor worked 40.8 hours in 2009 … he was on a leave of absence prior to April 5, 2009; May worked 204.0 hours; and Ira worked 241.2 hours. (Ex. K: GE Response to Request for Production of Documents, GE000051 – GE000145; GE001462 – GE001524; GE001690 – GE001697; GE001525 – GE001731; GE001740 – GE001785)

GE's time records for QCI's for June 2009 to October 2009 show the following regarding overtime: Majors worked 55.3 hours for June to October 2008 and 14.6 hours in the same period in 2009, prior to her retirement; Abrams worked 75.1 hours in 2010; Taylor worked 11.9 hours in 2009 … he was on a leave of absence prior to April 5, 2009; May worked 147.6 hours; and Ira worked 139.6 hours. (Ex. K: GE Response to Request for Production of Documents, GE000051 – GE000145; GE001462 – GE001524; GE001690 – GE001697; GE001525 – GE001731; GE001740 – GE001785)

[1] Exhibit N – Time Records Summary is a summary of the detailed clock in's and clock out's of the QCIs. "W/E" is week ending. Fridays worked are noted with the number "1" so that they can be counted.

2. Fridays

GE's time records for QCI's for calendar year 2009 show the following regarding Fridays: Majors worked 22 in 2008 and 10 in 2009, prior to her retirement; Abrams worked 34 in 2010; Taylor worked 10 in 2009 … he was on a leave of absence prior to April 5, 2009; May worked 9; and Ira worked 17. (Ex. K: GE Response to Request for Production of Documents, GE000051 – GE000145; GE001462 – GE001524; GE001690 – GE001697; GE001525 – GE001731; GE001740 – GE001785)

GE's time records for QCI's for June 2009 to October 2009 show the following regarding Fridays: Majors worked 9 in 2008 and 3 in 2009, prior to her retirement; Abrams worked 14 in 2010; Taylor worked 5 in 2009 … he was on a leave of absence prior to April 5, 2009; May worked 5; and Ira worked 7. (Ex. K: GE Response to Request for Production of Documents, GE000051 – GE000145; GE001462 – GE001524; GE001690 – GE001697; GE001525 – GE001731; GE001740 – GE001785)

III. Statement of Material Facts in Dispute

A. Whether Majors Lifted Heavy Parts in a Previously Held PMA Position

Majors handled compressors and other heavy parts during her earlier tenure as a PMA from December 2000 to June 2001. (Ex A: Majors Dep., p. 20)

B. Whether Majors' Medical Restrictions Were Properly Deemed Permanent

Majors contended that it was possible that the medical restrictions no longer applied to her; Kristoff, on the other hand, took the position that it was not possible … that the restrictions remained permanent. (Ex F: Kristoff Dep., p. 80-81) At least on one occasion, on September 6, 2005, Kristoff was uncertain about the permanency of Majors' medical restrictions, as evidenced by her call to the doctor involved. (Ex F: Kristoff Dep., p. 82; Ex. I: GE Response to Request for Production of Documents, GE000287)

Kristoff claimed no knowledge that Majors thought that the restrictions no longer applied. (Ex F: Kristoff Dep., p. 81) Majors testified that she had repeatedly told Kristoff in May 2009 that permanent restrictions no longer applied; she also advised Karr and Jones of the same thing, when they disqualified her from the PMA position that was open in May 2009. (Ex A: Majors Dep., p. 96-97) GE suggested that Majors should have provided her own doctor's statement removing the medical restrictions despite her injury being work-related and invoking the Worker's Compensation Act. (Ex A: Majors Dep., p. 104)

C. Whether GE's Accommodation Review Met the Legal Requirements of the ADA

GE described an interactive review process to determine whether Majors could be accommodated in some manner to permit her to perform the PMA job. (Ex E: Karr Dep., p. 39) Karr, though the chairperson of the ADA Committee, was not part of this process. (Ex E: Karr Dep., p. 39) She described the interactive process used for Majors as not part of the ADA process. (Ex E: Karr Dep., p. 39) Lewellen and Majors discussed the option of having a material handler transport the larger defective parts. (Ex G: Lewellen Dep., p. 10-11)

D. Whether Majors'Retirement Was Chosen Under Duress

Majors asserts that she elected to retire under "distress." (Ex A: Majors Dep., p. 190-192) She had just returned from her mother's funeral when confronted with making the retirement decision, was trying to cope with being awarded the PMA job and then being disqualified for it, and continuing to be denied overtime and the opportunity to work Fridays. (Ex A: Majors Dep., p. 190-192)

E. Whether Majors Was Disfavored Regarding Her Access to Overtime and Fridays Compared to Other QCIs

The Collective Bargaining Agreement provided for the assignment of overtime; however, Majors disagreed, describing actual practice by stating "But that's not the way it's ever been." (Ex A: Majors Dep., p. 66-67)

F. Scope of the EEOC Charges

At the time she filed her second EEOC Charge on March 30, 2010, Majors provided the EEOC with the attached, handwritten document so that they would investigate the issues of assignment of overtime and working Fridays. (Ex. B: Majors' Aff., Ex. 1, ¶ 3)

V. Standard of Review

A. Summary Judgment

A genuine issue of material fact exists if there is sufficient evidence for a reasonable jury to return a verdict in favor of the non-moving party on the particular issue. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). The burden is on the moving party to demonstrate "that there is an absence of evidence to support the non-moving party's case." Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). The record should be examined in the light most favorable to the non-moving party. Fisher v. Wayne Dalton Corp., 139 F.3d 1137, 1140 (7th Cir. 1998). Since intent and credibility are crucial issues in employment discrimination cases, the summary judgment standard is "applied with added rigor" in such cases. Huff v. UARCO, Inc., 122 F.3d 374, 380 (7th Cir. 1997).

B. Prima Facie Case of Disability Discrimination under the ADA

Majors uses the burden-shifting methodology set forth in McDonnell Douglas Corp. v.

Green, 411 U.S. 792 (1973). She "must show: (1) that [s]he is disabled within the meaning of the ADA, (2) that [s]he was qualified for the … position …, (3) that [s]he was subject to an adverse employment action, and (4) that the circumstances surrounding the adverse action indicate that it is more likely than not that … [her] disability was the reason for it." (citations omitted). If Majors succeeds in establishing a *prima facie* case, GE must then offer a lawful, nondiscriminatory reason for its adverse action. Silk v. City of Chicago, 194 F.3d 788, 799 (7th Cir. 1999). If GE does so, Majors must rebut that reason by showing that the proffered reason is actually a pretext for discrimination.

C. *Retaliation*

The Seventh Circuit has explained that there are two ways in which a plaintiff can prove retaliation. See Rogers v. City of Chi. , 320 F.3d 748 (7th Cir. 2003); Sitar v. Indiana Dep't of Transp., 344 F.3d 720 (7th Cir. 2003); Stone v. City of Indianapolis Pub. Utils. Div., 281 F.3d 640 (7th Cir. 2002), *cert. denied*, 537 U.S. 879 (2002). The first method, known as the direct method, is similar to the approach adopted by other circuits, and requires proof that: 1) the employee engaged in protected activity; 2) she suffered an adverse employment action; and 3) there is a causal link between the protected activity and the adverse employment action. Hunt-Golliday v. Metropolitan Water Reclamation Dist., 104 F.3d 1004, 1014 (7th Cir. 1997).

As the Rogers court explained, the second method, or indirect method, does not require the plaintiff to demonstrate a "causal link between [the] protected action and an adverse employment action." Rogers, 320 F.3d at 755. The court in Stone held that a plaintiff need only show that "after filing the charge only she, and not any similarly situated employee who did not file a charge, was subjected to an adverse employment action even though she was performing her job in a satisfactory manner. If the defendant presents no evidence in response, the plaintiff is entitled to summary judgment. If the defendant presents unrebutted evidence of a noninvidious reason for the adverse action, she is entitled to summary judgment. Otherwise there must be a trial." Stone, 281 F.3d at 644.

V. Argument

A. Majors Was Disabled Under the Provisions of the ADA

An individual is disabled under the ADA if he (A) has a "physical or mental impairment that substantially limits one or more major life activities;" (B) has "a record of such an impairment," or (C) is "regarded as having such an impairment." 42 U.S.C. § 12102(2).

1. Majors' Impairment "Substantially Limited" A Major Life Activity

An impairment "substantially limits" a major life activity when the individual is "unable to perform a major life activity that the average person in the general population can perform" or is "significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner or duration under which the average person in the general population can perform that same major life activity." 29 C.F.R. § 1630.2(j).

2. Lifting Is A Major Life Activity

The persuasive authority of the Tenth Circuit sheds light on lifting as a major life activity in a case involving 26 plaintiffs, all of whom had lifting limitations. The Court found that "a plaintiff's permanent lifting restriction of fifteen pounds is sufficient to defeat summary judgment, even absent evidence comparing the individual to the ability of the general population, as prescribed in 29 C.F.R. § 1630.2(j)(1)." Gallegos v. Swift & Company, 237 F.R.D. 633, 643

(D. Colo. 2006) (citing Lowe v. Angelo's Italian Foods, Inc., 87 F.3d 1170, 1174 (10th Cir.1996) and Lusk v. Ryder Integrated Logistics, 238 F.3d 1237, 1240 (10th Cir.2001). "Such a restriction is 'substantially limiting on its face' and creates a 'genuine issue of material fact with respect to whether (plaintiff's) impairment substantially limited the major life activity of lifting." Id. (citing Lusk, 238 F.3d at 1240.

The Seventh Circuit found that a physician's restrictions prohibiting a plaintiff from overhead work, heavy lifting and pushing or pulling out from his body "might apply to a broad range of jobs, and are more than job specific," and thus defeat summary judgment even absent more specific analysis of the jobs from which he was excluded. Cochrum v. Old Ben Coal Co., 102 F.3d 908, 911 (7th Cir. 1996).

"The physical restrictions Cochrum's physician placed upon him--no overhead work, heavy lifting, or pulling and pushing out from his body--might apply to a broad range of jobs, and are more than job specific. As with the example of the bad back in the regulations, Cochrum's shoulder injury could disqualify him from any position at the mine, or in related work such as construction. In addition to listing a number of jobs in the mine, the magistrate judge seems to have assumed as a matter of law that plenty of places would employ Cochrum with his shoulder condition. But given the breadth of his physician's physical restrictions, a reasonable jury could conclude that Cochrum's shoulder impairment does substantially limit his ability to work. See, e.g., Hendry v. GTE North, Inc., 896 F.Supp. 816, 824 (N.D. Ind.1995) (issues of material fact existed as to whether employee was limited in major life activity of working due to migraine headaches). Cochrum has at least raised a genuine issue of material fact as to whether or not he is disabled under the ADA." Gallegos v. Swift & Company, 237 F.R.D. at 646 (citing Cochrum v. Old Ben Coal Co., 102 F.3d 908 (7th Cir. 1996).

Similarly, Majors has raised a genuine issue of material fact as to whether or not she is disabled under the ADA. GE's position is that Majors "admits" she is not disabled and, therefore, there is no need to reasonably accommodate her. Majors makes such an "admission" from a layman's perspective of the definition … she does not believe herself to be physically or mentally impaired. She, and GE as well, fail to examine the two other legal prongs of the definition. Here, one, if not both, of the remaining prongs of the definition of disabled applies, namely, the "record of impairment" prong and the "regarded as" prong. The genuine issue of material fact regarding whether or not Majors was disabled renders dismissal by summary judgment inappropriate for her claim of disability discrimination.

3. Record of Impairment

An individual can also qualify as disabled if he has a record of an impairment that substantially limits one or more major life activities. 42 U.S.C. § 12102(2)(B). This provision is intended to protect individuals who are not presently disabled but who may have been discriminated against because of a history of a disability, or because they have been misclassified as disabled. 29 C.F.R. § 1630, App.

The words of the regulations that are particularly applicable in Majors' case relate to the intent to protect "individuals who are not presently disabled but who may have been discriminated against because of a history of a disability." Majors claims that she is not presently disabled and that the permanent restrictions no longer apply to her. Majors' "record of impairment" consists of the various Medical Classification forms that were in Kristoff's custody. Majors was disabled according to the "record of impairment" requirements. GE violated the law when it failed to engage in the "reasonable accommodation" process.

4. Regarded as Impaired

An individual can also qualify as disabled if he is regarded as disabled. 42 U.S.C. § 12102(2)(C). An individual qualifies under this prong either by showing that an employer "mistakenly believes that a person has a physical impairment that substantially limits one or more major life activities," or that an employer "mistakenly believes that an actual, non-limiting impairment substantially limits one or more major life activities." Sutton v. United Air Lines, Inc., 527 U.S. 471, 489 (1999). In either case, an employer must "entertain misperceptions about the individual." Id. An employer is liable under the "regarded" theory even if the employer's misperception is innocent, based on a mistake of fact or on a mistaken interpretation of a medical report. Buskirk v. Apollo Metals, 307 F.3d 160, 167 (3rd Cir. 2002).

GE denies that it regarded Majors as disabled. Yet, it took her medical restrictions as genuine and enforced them (this time). Case law also supports lifting as a major life activity. Clearly, GE regarded Majors as disabled.

B. Majors Was A Qualified Individual under the ADA

A "qualified individual" is defined in relevant part as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8). A plaintiff must satisfy "the prerequisites for the position, such as possessing the appropriate educational background, employment experience, skills, licenses, etc.," and be able to "perform the essential functions of the position held or desired, with or without reasonable accommodation." 29 C.F.R. App. § 1630.2(m).

GE does not dispute Majors' qualifications related to education and experience. Rather, GE challenges her ability to perform an essential function of the PMA position … "intermittent lifting of heavy objects." GE never progressed as far as a consideration of "reasonable accommodation."

C. GE Failed to Accommodate Majors in Violation of the ADA

The ADA prohibits discrimination against individuals with a disability. 42 U.S.C. § 12112(a). Discrimination includes failure to make a reasonable accommodation to the known physical or mental limitations of an otherwise qualified individual, unless the accommodation "would impose an undue hardship on the operation" of the employer. 42 U.S.C. § 12112(b)(5)(A).

GE never progressed as far as a consideration of "reasonable accommodation," though it had done so on numerous previous occasions. The difference this time was the fact that a promotion was at stake. It ignored the requirement that the process be interactive. When Majors suggested using the material handlers to help move heavy objects, her idea was flatly rejected without a counter-proposal. GE considered Majors' proposal to be an "undue hardship" on the company … the record reflects no evidence as to why. GE denied Majors her rights when it failed to engage in the interactive "reasonable accommodation" process.

D. GE's Reason for Failing to Promote Majors Is Pretextual

GE asserts the reason Majors was not promoted to the PMA positions in 2009 was her inability to perform an essential function of the job, that is, intermittent lifting of heavy objects, due to her permanent medical restrictions. GE's reason is pretextual, considering the following observations:

1. GE Previously Permitted Majors to Work as a PMA in Violation of Her Medical Restrictions

Majors worked as a PMA from December 2000 until June 2001. During this period, Majors was temporarily restricted from lifting more than 20 pounds and from working above eye level with her right arm. Despite GE's contention, without any evidence, that there were more plastic parts at that time, the applicable job description was the same one that was last revised in 1993 and used to disqualify her from the PMA positions in 2009. The requirement for "intermittent lifting of heavy objects" existed at both times; Majors' medical restrictions were the same at both times; yet, Majors was denied the PMA positions. GE's inconsistencies in this regard smack of pretext.

2. GE Allowed Majors to Remain a QCI in Violation of Her Medical Restrictions

GE created another inconsistency when it let Majors remain in the QCI position even though the QCI would be required to accomplish "intermittent lifting of heavy objects," according to the job description. Apparently, GE appreciates precision regarding the weights of parts handled by the PMA's but not so for the QCI's. Under Majors' restrictions, she could, according to GE, perform the QCI job but not the PMA job.

3. GE Failed to Keep Majors' Medical Restrictions Current

On September 24, 2002, Majors was classified as permanently restricted from lifting more than 20 pounds and from working above eye level with her right arm. There were no updates in the approximately seven years between the time the restrictions were given and the time they were used to deny Majors the 2009 PMA promotions. They were, however, reviewed at least once after 2001, when the company doctor initially made the restrictions permanent. If the Medical Classification forms were in fact arranged in the file in reverse chronological order, as she testified they were, Kristoff would have seen the inconsistencies and the need to re-examine the restrictions.

Moreover, the Medical Classification form had a space titled "RE-EXAM," where either a date or the abbreviation "prn" (as needed) was written. GE contemplated subsequent review of the restrictions, as indicated by the notation "prn" on Majors' Medical Classification form dated August 9, 2001. Majors' Medical Classification form dated September 24, 2002 had the notation "D/C" in the "RE-EXAM" space. The layout of the Medical Classification form itself clearly indicates it was intended to be reviewed and updated.

Kristoff had multiple opportunities to resolve the issue of the currency of the medical restrictions by simply having the company doctor re-examine Majors. She knew they were an issue in 2005 when Majors had an ankle injury … she did nothing. She knew they were an issue in May 2009, when Majors was disqualified from the temporary PMA position … she did nothing and unbelievably claimed Majors said nothing about it to her. GE suggested that Majors should have provided her own doctor's statement removing the medical restrictions, ignoring the fact that her injury was work-related, which made it a worker's compensation matter and the company doctor responsible for patient management.

Majors was very vocal about the misapplication of the restrictions. The fact that Kristoff then did nothing between May and October 2009, when Majors was disqualified from the permanent PMA position, is even more astounding … her refusal to reevaluate the permanency of the restrictions let the disqualification process unfold for a second disappointing time for Majors. Kristoff's claim of lack of knowledge regarding Majors' clearly articulated position is disingenuous and smells of pretext.

GE focused on the essential functions of the PMA position and, in particular, the lifting requirements without consideration of whether Majors' restrictions still applied. Had it given the latter due consideration, the ensuing litigation may have been avoided altogether. GE was unreasonably steadfast in maintaining that Majors' work restrictions were not subject to review to assure their currency. In so doing, GE prevented Majors from being promoted because of her record of disability.

4. Job Descriptions for Majors' Present and Desired Positions Remained Identical Regarding Lifting Requirements

There is no evidence that GE did anything between May and October 2009 to clarify the QCI and PMA job descriptions as to lifting requirements.

E. Majors Can Establish A Claim For Retaliation By Direct Evidence

1. Protected Activity

Even if Majors' underlying claim of discrimination should fail, her claim of retaliation can survive. *Pantoja v. American NTN Bearing Mfg. Corp.*, 495 F.3d 840 (7th Cir. 2007). As long as Majors truly did believe she was discriminated against by GE at the time she first complained, she will be deemed to have engaged in protected activity under the law. Bernier v. Morningstar, Inc., 495 F.3d 369, 376 (7th Cir. 2007).

"Oppositional" protected activity and "participatory" protected activity are distinguishable. The "participation clause" in Title VII provides that an employer may not retaliate against an employee because the employee has participated in any manner in an investigation, proceeding, or hearing. Importantly, it is designed to assure that Title VII protections are not undermined by retaliation against employees who use the Title VII process to protect their rights.

On the other hand, the "opposition clause" of Title VII provides that an employer may not retaliate against an employee because he has opposed an unlawful employment practice under Title VII. Vaughn v. Epworth Villa, 2008 WL 3843340 (10th Cir. 2008)

Majors fully engaged in oppositional protected activity when she filed her EEOC charge on May 22, 2009. See Worth v. Tyer, 276 F.3d 249, 265 (7th Cir. 2001) ("statutorily protected" activity not limited to filing of EEOC charge). GE has not and cannot put forth any legitimate reason why Majors' oppositional protected activity is, in any way, tainted. Therefore, she meets the required element of proof related to protected activity … she opposed what she believed to be unlawful activity.

2. Adverse Employment Actions

Though broadly defined, "adverse employment action" in the context of a retaliation claim must result in some significant change in employment status. Bell v. EPA, 232 F.3d 546, 555 (7th Cir. 2000). Both qualitative and quantitative changes in terms or conditions of employment are considered. Patt v. Family Health Sys., 280 F.3d 749, 753 (7th Cir. 2002). The adverse employment action must be "a materially adverse change in the terms and conditions of employment [that is] more disruptive than a mere inconvenience or an alteration of job responsibilities." Crady v. Liberty Nat'l Bank and Trust Co., 993 F.2d 132, 136 (7th Cir. 1993).

Here, Majors asserts that GE denied her overtime and the opportunity to work Fridays. Clearly, the negative economic impact associated with these lost opportunities for more work constitutes a material adverse change in the terms and conditions of employment. This element of proof is established.

3. Causal Connection

Close temporal proximity is evidence of causation and "may permit a plaintiff to survive summary judgment provided that there is also other evidence that supports the inference of a causal link." Lang v. Ill. Dep't of Children & Family Servs., 361 F.3d 416, 419 (7th Cir. 2004).

Majors engaged in protected activity on May 22, 2009 when she filed her first EEOC charge. For the period May to October, Majors worked 55.3 hours of overtime in 2008; her overtime for the same period in 2009 was only 14.6 hours … a 74% decrease. Similarly, for the period May to October, Majors worked 9 Fridays in 2008; her Fridays for the same period in 2009 was only 3 … a 67% decrease. This close temporal proximity is, on its face and without more, evidence of a causal link between the protected activity and the adverse employment actions.

Majors can establish a *prima facie* case of retaliation by the direct method of proof and should be permitted to take her case to the jury. GE's motion for summary judgment should be denied.

F. Majors Can Establish A Claim For Retaliation ByThe Indirect Method

1. Protected Activity And Adverse Employment Actions

As previously addressed, Majors engaged in the protected activity required to prove that element of her claim for retaliation. In addition, Majors has met the element of proof related to the adverse employment action.

2. Work Performance Met Expectations

Majorss was qualified for her job as a QCI at GE; her performance was rated as satisfactory and she was eligible for re-employment.

3. Treatment Less Favorable Than Similarly Situated Employees

In its brief, GE addresses the issue of the required comparison to similarly situated employees with mere conclusory statements about the equalization of overtime … even though GE maintains that equalization just happened as a result of the CBA's very existence. GE presents no evidence that equalization occurred … because it did not. Majors, on the other hand, can point to supporting data … the time records produced by GE.

There is no record evidence that any other QCI employees besides Majors filed EEOC charges alleging denial of the opportunity for overtime and Friday work. Therefore, every other QCI employee besides Majors is in the "comparison" universe. GE can point to no other employee in that universe who was performing satisfactorily and who was subjected to the same adverse employment action sustained by Majors. Majors was the only one who was performing satisfactorily and was denied overtime and the opportunity to work Fridays.

G. GE's Reasons For Its Actions Are Pretextual

GE bears the burden of explaining its actions as Majors has established a *prima facie* case of retaliation. The truth and veracity of GE's proffered non-discriminatory reasons for its conduct completely fall apart upon examination of the following circumstances:

1. GE's Equalization Argument Is Unsupported

The distribution of overtime and Fridays was to be done in a manner provided by the CBA that would result in employees in the same job classification receiving approximately the same amount of extra work. An examination of time records, as described elsewhere herein, clearly shows just the opposite. Majors also testified that this theoretical system was not how it worked. GE presented no evidence regarding this theoretical norm.

2. Supervisors' Knowledge Regarding EEOC Activity

GE argues that the two supervisors who scheduled Majors' overtime and Fridays had no knowledge of Majors having filed an EEOC charge. This would be a valid argument but for the untimely death of one of the supervisors, Gary Hamilton, who passed before suit was filed. Under the circumstances, Majors was placed in a position where it was impossible to determine what Hamilton knew or did not know and what he did or did not do regarding the assignment of overtime and Friday work.

3. Similarly Situated Employees Were Treated More Favorably

Majors has more than mere hearsay evidence to support her assertion that other QCI's were treated more favorably than her. For example, Abrams, who was Majors' replacement, worked eight times more overtime in 2010 than Majors worked in 2009. May and Ira worked eight and nine times the overtime that Majors worked in 2009.

GE argues that the job classifications (9014 vs 9018) for QCI's account for the discrepancies but, interestingly, offers no evidence of the distinction (eg., job descriptions) that would explain the wide variance in overtime hours worked.

The most reasonable inference derived from these circumstances is that GE denied Majors overtime and the opportunity to work Fridays because she complained about discrimination to the EEOC. GE's reasons for its employment decisions constitute pretext.

Since GE's reasons for its employment decisions are pretextual, they are therefore not a defense to Majors' claim for retaliation. GE's motion for summary judgment should be denied and Majors' case should go to the jury.

H. Allegations Outside the Body of the Charge Should Be Considered

It is well established that the scope of an EEOC charge limits the scope of a subsequent federal complaint. Teal v. Potter, 559, F.3d 687, 691 (7th Cir. 1992). Employees who claim to have suffered discrimination pursuant to Title VII or the ADA must exhaust administrative remedies prior to bringing a lawsuit by filing an administrative charge claiming discrimination. 29 U.S.C. § 794a(a)(1).

Cognizable claims set forth in a complaint must be "like or reasonably related to the allegations of the charge and growing out of such allegations." Jenkins v. Blue Cross Mut. Hosp. Ins., 538 F.2d 164, 167 (7th Cir.) (*en banc*). Claims are not alike or reasonably related unless a factual relationship exists between them. Cheek v. W. & S. Life Ins. Co., 31 F.3d 497, 501 (7th Cir. 1994). At a minimum, plaintiff's EEOC charge and complaint must describe the same conduct and implicate the same individuals. See Id.

"Nevertheless, because EEOC charges are often completed by laypersons, a Title VII plaintiff need not allege each and every fact in the charge that, in the aggregate, form the basis of the claims in the complaint." Cheek, 31 F.3d at 500; Babrocky v. Jewel Food Co., 773 F.2d 857, 865-66 (7th Cir. 1985) (holding that it is an error for a court to require an exact correspondence between the words of an EEOC charge and the contents of a Title VII complaint and that EEOC charges are to be construed with "utmost liberality").

Allegations outside the body of the charge may be considered when it is clear that the charging party intended the agency to investigate the allegations. See, e.g., Rush, 966 F.2d at 1110-11 (plaintiff's EEOC affidavit contained "explicit reference" to types of discrimination alleged in complaint); Box v. A & P Tea Co., 772 F.2d 1372, 1375 (7th Cir. 1985) (handwritten addendum to typed charge of race discrimination, also suggesting sex discrimination, sufficient to permit judicial claim), *cert. denied*, 478 U.S. 1010 (1986). "[I]n assessing the scope of the EEOC charge, [the Court] may consider [plaintiff's] statements in a sworn affidavit that she filed in support of the charge." W. & S. Life Ins. Co., 31 F.3d 497, 502 (7th Cir. 1994).

On March 30, 2010, the same day that she filed her second charge, Majors faxed to the EEOC a single handwritten page and a fax coversheet that raised the issues of overtime and working Fridays. As her affidavit provides, she intended that these issues be investigated as part of her charge.

H. *GE Engaged in a Continuing Pattern of Illegal Conduct – Its Conduct Prior to June 3, 2009 Should Be Considered*

The continuing violation doctrine permits a plaintiff to pursue alleged discriminatory acts that occurred outside the statutory period under Title VII. Over time, courts have applied the continuing violation doctrine in four types of situations:

(a) serial violations, which involve a number of similar discriminatory acts, both before and during the statutory period;

(b) systemic violations, which involve the continuing policy or practice of discrimination on a company-wide basis, which policy or practice continues into the statutory period;

(c) actions involving sub-acts, each of which may be a reasonable starting point for the limitations period (such as a discharge and the exhaustion of a grievance process disputing it); and

(d) actions involving the effects of a discriminatory act that occurred outside the statutory period (i.e., present effects of past discrimination).

The United States Supreme Court does not recognize the application of the continuing violation doctrine in the third and fourth situations. National Railroad Passenger Corp. (Amtrak) v. Morgan, 536 U.S. 101 (2002). Morgan also rejects the first situation, at least with respect to discrete acts of discrimination. It still permits application of the doctrine with respect to serial hostile environment claims. Morgan left unresolved the issue of whether the continuing violation doctrine applies to systemic violations. It does not preclude application of continuing violation doctrine to pattern and practice cases). EEOC v. Dial Corp., 2002 WL 1974072 (N.D. Ill. 2002)

Here, GE's conduct regarding assignment of overtime and Fridays is a pattern and practice. Therefore, GE's conduct prior to June 3, 2009 should be considered.

I. Majors Was Constructively Discharged

GE discriminatorily denied Majors two promotions and the opportunity to work overtime and Fridays. Over time, this conduct by her employer caused her extreme stress … conditions so intolerable that she chose to retire early. The most telling fact about her decision being forced is that she applied for the second PMA position after she elected to retire … she did not want to leave GE's employment.

VII. Conclusion

For the reasons set forth herein, Plaintiff, Renee Majors, by counsel, respectfully requests that this Court deny Defendant's Motion for Summary Judgment, and for all other just and proper relief.

Respectfully submitted,

STEVEN SAMS, P.C.

s/ *Steven Sams*
Steven Sams, Attorney for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on May 25, 2012, I electronically filed the foregoing with the Clerk of the Court using its CM/ECF system, which sent notification of such filing to the following:

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